Not To Be Published

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DANIEL CASTRO, Defendant.	No. CR00-3020-MWB **ORDER REGARDING DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE**

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I. INTRODUCTION AND BACKGROUND

On September 29, 2000, a Superseding indictment was returned charging defendant Daniel Castro with possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841, and conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 846. On October 4, 2000, following a jury trial, defendant Castro was found guilty of possession of methamphetamine with intent to distribute and acquitted on the conspiracy charge. On January 5, 2001, defendant Castro was sentenced to 188 months imprisonment. Defendant Castro appealed both his conviction and sentence. The Eighth Circuit Court of Appeals affirmed defendant Castro's conviction and sentence. *See Ortega v. United States*, 270 F.3d 540, 549 (8th Cir. 2001).

Pursuant to 28 U.S.C. § 2255, defendant Castro filed his *pro se* Motion To Vacate,

Set Aside Or Correct Sentence which is presently before the court. Defendant Castro raises the following claims in his § 2255 motion: (1) that his counsel was ineffective for failing to conduct an adequate pretrial investigation; (2) that his counsel was ineffective for failing to prepare a blame shifting defense; (3) that his counsel was ineffective for failing to file a timely motion to suppress; (4) that his counsel was ineffective for failing to move for severance; (5) that his counsel was ineffective for failing to appeal a magistrate judge's decision to deny defendant Castro's motion to continue trial and extension of time to file a motion to suppress; (6) that his counsel was ineffective for failing to withdraw from the case; (7) that his counsel was ineffective for failing to resubmit defendant Castro's motion to suppress and motion to continue trial after the superseding indictment was filed against him; (8) that his counsel was ineffective for failing to move to dismiss the Superseding indictment; (9) that his counsel was ineffective for failing to withdraw after trial; (10) that his counsel was ineffective for not being able to raise ineffective assistance of counsel on direct appeal; (11) that his counsel was ineffective for failing to request that defendant Castro be sentenced for a schedule III controlled substance; (12) that his counsel was ineffective for failing to request a minimal or minor role adjustment in his sentence; and (14) that his sentence was incorrect because his criminal history category was in part based on a conviction that was subsequently vacated.

II. LEGAL ANALYSIS

A. Standards Applicable To § 2255 Motions

The Eighth Circuit Court of Appeals has described 28 U.S.C. § 2255 as "the statutory analogue of habeas corpus for persons in federal custody." *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987). In *Poor Thunder*, the court explained the purpose of the statute:

> [Section 2255] provides a remedy in the sentencing court (as opposed to habeas corpus, which lies in the district of confinement) for claims that a sentence was 'imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.'

Id. at 821 (quoting 28 U.S.C. § 2255). Of course, a motion pursuant to § 2255 may not serve as a substitute for a direct appeal, rather "[r]elief under [this statute] is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

The failure to raise an issue on direct appeal ordinarily constitutes a procedural default and precludes a defendant's ability to raise that issue for the first time in a § 2255 motion. *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 730 (1998); *Bousley v. Brooks*, 97 F.3d 284, 287 (8th Cir. 1996), *cert. granted*, 118 S. Ct. 31 (1997); *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152 (1982)). This rule applies whether the conviction was obtained through trial or through the entry of a guilty plea. *United States v. Cain*, 134 F.3d 1345, 1352 (8th Cir. 1998); *Walker v. United States*, 115 F.3d 603, 605 (8th Cir. 1997); *Matthews*, 114 F.3d at 113; *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997) (per curiam). A defendant may surmount this procedural default only if the defendant "'can show both (1) cause that excuses the default, and (2) actual prejudice from the errors asserted.'" *Matthews*, 114 F.3d at 113 (quoting *Bousley*, 97 F.3d at 287); *see also United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

B. Analysis Of Issues

1. Ineffective assistance of counsel claims

Defendant Castro asserts thirteen claims of ineffective assistance of counsel. Defendant Castro asserts that his counsel was ineffective in the following respects: (1) for failing to conduct an adequate pretrial investigation; (2) for failing to prepare a blame shifting defense; (3) for failing to file a timely motion to suppress; (4) for failing to move for severance; (5) for failing to appeal a magistrate judge's decision to deny defendant Castro's motion to continue trial and extension of time to file a motion to suppress; (6) for failing to withdraw from the case; (7) for failing to resubmit defendant Castro's motion to suppress and motion to continue trial after the superseding indictment was filed against him; (8) for failing to move to dismiss the Superseding indictment; (9) for failing to withdraw after trial; (10) for not being able to raise ineffective assistance of counsel on direct appeal; (11) for failing to request that defendant Castro be sentenced for a schedule III controlled substance; and, (12) for failing to request a minimal or minor role adjustment in his sentence. The court will consider each of these claims *seriatim*.

Twelve of these thirteen claims of ineffective assistance of counsel that Castro has presented in his § 2255 motion were not raised on direct appeal. However, claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings under 28 U.S.C. § 2255. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1105 (8th Cir. 1999) (reiterating that ineffective assistance of counsel claims "are best presented in a motion for post-conviction relief under 28 U.S.C. § 2255); *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998) (noting ineffective assistance of counsel claims more properly raised in 28 U.S.C. § 2255 motion) (citing *United States v. Martin*, 59 F.3d 767, 771 (8th Cir. 1995) (stating ineffective assistance of counsel claims "more

appropriately raised in collateral proceedings under 28 U.S.C. § 2255")); *United States v. Scott*, 26 F.3d 1458, 1467 (8th Cir. 1994) (declining to consider ineffective assistance of counsel claims raised for first time on direct appeal where claim not raised in a motion for postconviction relief pursuant to 28 U.S.C. § 2255). In order to prove a claim of ineffective assistance of counsel, a convicted defendant must demonstrate that (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. 2052; *Furnish v. United States of America*, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in Strickland requires a showing that (1) counsel was constitutionally deficient in his or her performance and (2) the deficiency materially and adversely prejudiced the outcome of the case); *Garrett v. Dormire*, 237 F.3d 946, 950 (8th Cir. 2001) (same). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Indeed, "counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir. 1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. *Id.* at 689, 104 S. Ct. 2052; *Collins v. Dormire*, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .") (citing *Strickland*). With respect to the "strong presumption" afforded to counsel's performance, the Supreme Court specifically stated:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse

> sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689, 104 S. Ct. 2052 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The court need not address whether counsel's performance was deficient if the defendant is unable to prove prejudice. *Apfel*, 97 F.3d at 1076 (citing *Montanye v. United States*, 77 F.3d 226, 230 (8th Cir.), *cert. denied*, 117 S. Ct. 318 (1996)); *see also Pryor v. Norris*, 103 F.3d 710, 712 (8th Cir. 1997) (observing "[w]e need not reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness."). The Supreme Court has stated that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697. The court now turns to its consideration of the specific claims of ineffective assistance of counsel raised in defendant Castro's § 2255 motion.

a. Failure to conduct an adequate pretrial investigation

Defendant Castro initially claims that his counsel was ineffective for failing to conduct an adequate pretrial investigation. He asserts that as a result, his counsel was unable to prepare a proper blame-shifting defense and to file a timely motion to suppress evidence. Thus, as to the second prong of *Strickland*, this argument is dependant on the results that would have been achieved if counsel had raised a blame- shifting defense now advocated by Castro or had he filed a timely motion to suppress. The court will consider each of these issues in turn.

i. Blame-shifting defense

Defendant Castro argues that if his counsel had conducted an adequate pretrial investigation, he would have realized that the proper defense to be employed in this case was a "blame-shifting" defense in which the argument would be made that co-defendant Pablo Ortega could possibly have been responsible for stashing the methamphetamine found in Castro's automobile during the short period between Ortega's purchase of the Crown Victoria and his giving the car to Castro as payment for a debt, and that Ortega and/or co-defendant Polmanteer had devised the plan to transport the methamphetamine.

To prove that defendant Castro possessed methamphetamine with intent to distribute, the government was required to prove that: (1) defendant Castro was in possession of methamphetamine; (2) defendant Castro knew he was in possession of methamphetamine; and (3) defendant Castro intended to distribute some or all of the methamphetamine. *United States v. Serrano-Lopez*, 366 F.3d 628, 634 (8th Cir. 2004); *United States v. Bufford*, 108 F.3d 151, 153 (8th Cir. 1997); *United States v. Thomas*, 58 F.3d 1318, 1322 (8th Cir. 1995). Possession may be either actual or constructive. *Serrano-Lopez*, 366 F.3d at 634; *United States v. Boyd*, 180 F.3d 967, 979 (8th Cir. 1999); *Bufford*, 108 F.3d at 153; *United States v. Anderson*, 78 F.3d 420, 422 (8th Cir. 1996); *United States v. Johnson*, 18 F.3d 641, 647 (8th Cir. 1994); *United States v. Kiser*,

948 F.2d 418, 425 (8th Cir. 1991);*United States v. Luster*, 896 F.2d 1122, 1125 (8th Cir. 1990). "Constructive possession exists when a person has ownership, dominion, or actual control over the contraband." *Anderson*, 78 F.3d at 422; *accord Serrano-Lopez*, 366 F.3d at 634; *United States v. Lee*, 356 F.3d 831, 837 (8th Cir. 2003). Intent to distribute may be inferred solely from possession of a large quantity of a controlled substance. *Serrano-Lopez*, 366 F.3d at 634; *United States v. Wheat*, 278 F.3d 722, 740 (8th. Cir. 2001), *cert. denied*, 537 U.S. 850 (2002); *United States v. Gonzalez-Rodriguez*, 239 F.3d 948, 951 (8th Cir. 2001).

Here, the court has no trouble in determining that defendant Castro has failed to show that he was prejudiced by his counsel's performance and therefore cannot demonstrate ineffective assistance of counsel on this ground. First, Castro's "blame-shifting" defense would not explain Castro's presence in the car or the reason for his trip from California to Minnesota. Castro told Iowa State Trooper Matthew Anderson that he and his co-defendants were going to the "big mall" in the Twin Cities and were doing so at co-defendant Polmanteer's suggestion.[1] Tr. at 11. Yet, Polmanteer told law enforcement officers that she had ridden along to get out of the oppressively hot weather conditions in California. Tr. at 11. Moreover, despite Castro's claim of driving from California to Minneapolis for the purpose of visiting the Mall of America, law enforcement officers found no cash, credit cards, travelers' checks, or ATM cards on Castro or his co-defendants which could have been used for shopping at the Mall of America. Tr. at 57, 158. In addition, Castro's "blame-shifting" defense offers no explanation for Castro's inconsistent and contradictory account of how he came to acquire the Ford Crown Victoria he was riding in when he was stopped. Although he asserts in his moving papers that he

[1]This is an apparent reference to the Mall of America located in Bloomington, Minnesota, a suburb of Minneapolis, Minnesota.

received the automobile from co-defendant Ortega in satisfaction for a debt Ortega owed him, Castro initially told Trooper Anderson that he had purchased the vehicle from an individual and then later told Trooper Anderson that he had gotten the vehicle from a salvage yard.[2] Tr. at 10, 24. Such inconsistencies in Castro's account of his trip support a finding of knowledge. *See Serrano-Lopez*, 366 F.3d at 634. More importantly, Castro's purported "blame-shifting" defense does not change the fact that he was the owner of the Crown Victoria which had signs of tampering and obvious mechanical problems. As the Eighth Circuit Court of Appeals has noted, "[s]igns of tampering support an inference that the occupant of the car knew the drugs were hidden therein." *Serrano-Lopez*, 366 F.3d at 635; *Ortega v. United States*, 270 F.3d 540, 546 (8th Cir. 2001). Additionally, the Eighth Circuit Court of Appeals noted on direct appeal in this case that "[t]he jury also could have inferred guilty knowledge from the fact that Castro did not telephone to inquire about picking up the car after the search at the garage, but instead fled to the bus station." *Ortega*, 270 F.3d at 546. The "blame-shifting" defense advocated by Castro would have no effect upon these circumstances nor the inferences that could be drawn from them. Finally, the court notes that, other than alleging that he received the Crown Victoria from co-defendant Ortega, Castro has not suggested that he had any other evidence which would support his "blame-shifting" defense. Given the lack of evidence to support a "blame-shifting" defense and the deficiencies in that defense here, the court finds that Castro has failed to show he was prejudiced by his counsel's actions and therefore cannot demonstrate ineffective assistance of counsel. Therefore, this part of defendant Castro's motion is

[2]Similarly, Castro's purported defense also would not have provided any logical explanation for his inconsistent and contradictory statements regarding the identity of the fourth person in the Crown Victoria, Viaz Savala. Castro initially told Trooper Anderson that Savala was a friend of his but then later told Anderson that he did not know Savala's name and that he had picked Savala up somewhere in Nebraska. Tr. at 11, 13.

denied.

ii. Motion to suppress

Defendant Castro argues that if his counsel had conducted an adequate pretrial investigation, he would have been able to file a timely motion to suppress the evidence found in Castro's Crown Victoria. As noted above, a defendant wishing to vacate his conviction on the basis of ineffective assistance of counsel must establish that his attorney's performance fell below an objective level of reasonableness and that he was prejudiced by his attorney's error such that the result of the proceeding was rendered fundamentally unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993); *Strickland*, 466 U.S. at 687-88. Where the principal allegation of ineffectiveness is the attorney's failure to file a motion to suppress evidence from an illegal search pursuant to the Fourth Amendment, the petitioner must also prove that his Fourth Amendment claim has merit, and that there is a reasonable probability that the verdict would have been different without the excludable evidence. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). In evaluating whether counsel's performance was ineffective for failing to file a motion to suppress the physical evidence in this case, we must first consider the relative merit of that motion. Here, the court finds that Castro's counsel was not ineffective in failing to file a motion to suppress in this case because such a motion would have been without merit. Trooper Anderson stopped Castro's Ford Crown Victoria for speeding. It is axiomatic that the existence of a traffic violation justifies a traffic stop without violating the driver's Fourth Amendment rights. *See United States v. Herrera-Martinez*, 354 F.3d 932, 934 (8th Cir. 2004); *United States v. Pereira-Munoz*, 59 F.3d 788, 791 (8th Cir. 1995). Here, Trooper Anderson observed Castro's automobile speeding. Police officers may stop a vehicle for any traffic violation, however minor. *See United States v. Brown*, 345 F.3d 574, 578 (8th Cir. 2003) (speeding); *United States v. Linkous*, 285 F.3d 716, 719 (8th Cir.

2002) (following too close); *United States v. Edmister*, 208 F.3d 693, 694 (8th Cir. 2000) (weaving within its own lane and having license plate illuminator that was burned out), *cert. denied*, 531 U.S. 1179 (2001); *United States. v. Perez*, 200 F.3d 576, 579 (8th Cir. 2000) (following too close); *United States v. Beatty*, 170 F.3d 811, 813 (8th Cir. 1999) (no working light illuminating license plate); *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998) (following too close). After having made a valid traffic stop, an officer may detain a driver while completing a number of routine tasks, such as computerized checks of the driver's license and criminal history. See *United States v. Yang*, 345 F.3d 650, 655 (8th Cir. 2003) ("An officer making a traffic stop may ask the driver for his destination and the purpose of his trip."), *cert. denied*, 124 S. Ct. 1694 (2004); *United States v. Linkous*, 285 F.3d 716, 719-21 (8th Cir. 2002) (officer making traffic stop does not violate Fourth Amendment by asking driver for his destination and purpose, checking license and registration, or requesting driver to step over to patrol car); *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643, 647 (8th Cir. 1999) ("[T]he police officer may detain the offending motorist while the officer completes a number of routine but somewhat time-consuming tasks related to the traffic violation, such as computerized checks of the vehicle's registration and the driver's license and criminal history, and the writing up of a citation or warning.")

Here, Polmanteer was driving the Crown Victoria and Castro was the front seat passenger. Polmanteer, however, could not produce a driver's license. Although the automobile was registered to Castro, he could not produce insurance papers in his own name. Castro told Trooper Anderson that the previous owner had continued insurance on the car. Polmanteer and Castro told Anderson that they were going to the Mall of America for shopping. Polmanteer identified the back seat passengers as Ortega and the other as Castro's uncle, but later told Anderson the fourth passenger was a hitchhiker. Although

Castro first had claimed the fourth passenger, Viaz Savala, was his friend, he later stated he did not know the passenger's name. Trooper Anderson then requested permission to search Castro's automobile and Castro consented to such a search. Since Castro consented to a search of his car, Trooper Anderson could act on the information he obtained. *See Yang*, 345 F.3d at 656 ("The officer may ask for consent to search and if consent is given, act on whatever information he acquires.") (citing *United States v. Martinez*, 168 F.3d 1043, 1047 (8th Cir. 1999). During Trooper Anderson's search of Castro's Crown Victoria, he noticed signs of tampering in the car and this, combined with discrepancies and inconsistencies in the statements given to him by the individuals traveling in the car, raised Trooper Anderson's suspicions that the car might be transporting illegal drugs. As a result, Trooper Anderson had the vehicle towed to a safe location and he obtained a search warrant before conducting any further searches of it. Although the officers found no drugs during this second search of the car, they subsequently reviewed the audio portion of a videotape recording that was taken from inside Trooper Anderson's patrol car when Castro, Polmanteer, and Ortega were inside the patrol car during Trooper Anderson's initial consent search of Castro's automobile.[3] Polmanteer's voice was identifiable as the only female voice, and the government was unable to attribute statements made by the two males specifically to Castro or Ortega. A portion of the conversation was as follows:

> Polmanteer: Are there drugs in that f----- car right now?
> Male: Why?
> Polmanteer: Cause I'm going to f---- jail if there are. I'm

[3] Because the video camera in Trooper Anderson's patrol car was located to the right of the rear view mirror and faced forward, it captured the events outside the patrol car. However, a microphone on the door frame captured the conversation inside the patrol car.

going to jail. And you're going to jail.

* * *

Male: Don't get excited. He has to find drugs in the car first [unintelligible]

Gov't Ex. #1. After viewing the videotape, Anderson applied for and received another search warrant for Castro's automobile. During the third search, officers removed the windshield and found six and one-half pounds of methamphetamine hidden in a compartment beneath the windshield. The court concludes that the law enforcement officers had probable cause to obtain a warrant to search Castro's automobile given the information they had following the traffic stop and upon reviewing the audio portion of the video tape.

Alternatively, even if the court were to conclude otherwise on the question of probable cause, the court concludes that the good faith exception to the exclusionary rule announced by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 923 (1984) would preclude Castro from prevailing on his Fourth Amendment claim. In *Leon*, the United States Supreme Court held that evidence seized by police officers acting in objectively reasonable good-faith reliance on a search warrant issued by a neutral and detached magistrate, but ultimately found to be unsupported by probable cause, need not be suppressed. *Leon*, 468 U.S. at 922-25; *accord United States v. Johnson*, 78 F.3d 1258, 1261 (8th Cir.), *cert. denied*, 519 U.S. 889 (1996). Thus, "[t]he Court in *Leon* created the good-faith exception to the exclusionary rule." *Johnson*, 78 F.3d at, 1261. The Supreme Court noted the division of authority between the judicial officer, whose duty includes "issu[ing] a warrant comporting in form with the requirements of the Fourth Amendment," and the police officer who, in the ordinary case, "cannot be expected to question the magistrate's . . . judgment that the form of the warrant is technically sufficient." *Leon*, 468 U.S. at 921.

The Supreme Court explained that the exclusionary rule is a deterrent measure designed to ensure compliance with the Fourth Amendment. *See id*. at 906; *accord Johnson*, 78 F.3d at 1261 ("The purpose of the exclusionary rule is to deter police misconduct."); *United States v. Moore*, 956 F.2d 843, 847 (8th Cir. 1992) (same). The Court believed that, where police obtain evidence in reliance on a search warrant that is subsequently found to be defective, "there is no police illegality and thus nothing to deter." *Leon*, 468 U.S. at 921. Hence, exclusion of seized evidence under those conditions serves no salutary purpose, because that sanction "cannot logically contribute to the deterrence of Fourth Amendment violations." *Id*. The Supreme Court concluded that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id*.

Although *Leon* weakened the exclusionary rule, the Supreme Court did not eliminate the exclusionary rule. The Supreme Court acknowledged that suppression would continue to be appropriate in those situations where, notwithstanding the issuance of a warrant, "the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id*. at 919. The Supreme Court identified four circumstances in which the exclusionary rule is still appropriate:

> Suppression . . . remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his disregard of the truth. . . . The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role . . .; in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." . . . Finally, depending on the circumstances

> of the particular case, a warrant may be so facially deficient--i.e., in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid.

Id. at 923 (citations omitted); *see United States v. Marion*, 238 F.3d 965, 969 (8th Cir. 2001) (identifying these four circumstances from *Leon*); *United States v. Weeks*, 160 F.3d 1210, 1211 (8th Cir. 1998) (same); *United States v. Taylor*, 119 F.3d 625, 628 (8th Cir.) (same), *cert. denied*, 522 U.S. 962 (1997); *United States v. Phillips*, 88 F.3d 582, 586 (8th Cir. 1994) (same); *Johnson*, 78 F.3d at 1261 (same). However, the ultimate question under *Leon* is whether officers "had an objectively reasonable basis to believe they were complying with [applicable law] and the Fourth Amendment." *Moore*, 956 F.2d at 848; *see also United States v. Fletcher*, 91 F.3d 48, 51 (8th Cir. 1996) (the "relevant inquiry" was whether the facts surrounding the case were "close enough to the line of validity" that the police officers were entitled to believe their conduct complied with the law). The government bears the burden of establishing that the good-faith exception to the federal exclusionary rule should apply in a particular case. *Id.* at 924.

Here, Castro has offered no basis for concluding that Trooper Anderson's reliance on either of the search warrants was unreasonable. Castro has not directed the court's attention to anything which would indicate that the warrants were clearly invalid under Iowa law. Thus, the court concludes that a well-trained officer would not have known that the search of Castro's car was illegal and therefore it was reasonable for Trooper Anderson to rely on the search warrants for Castro's automobile. *See Leon*, 468 U.S. at 923. Accordingly, the court concludes that the *Leon* good faith exception to the exclusionary rule is applicable. Therefore, given the unlikelihood of success of a motion to suppress, Castro cannot establish that, but for his attorney's failure to file a motion to suppress, the outcome of the proceedings would have been different. *See Strickland*, 466 U.S. at 694.

Thus, Castro's claim fails the prejudice prong of the *Strickland* test.

b. Failure to prepare a blame-shifting defense

Defendant Castro next raises as an independent ground that his counsel was ineffective for failing to prepare a blame-shifting defense. For the reasons set forth above in section II(B)(1)(a)(i), the court concludes that Castro has failed to show he was prejudiced by his counsel's actions and therefore cannot demonstrate ineffective assistance of counsel. Therefore, this part of defendant Castro's motion is also **denied.**

c. Failure to file timely motion to suppress

Defendant Castro also raises as an independent ground that his counsel was ineffective for not filing a timely motion to suppress evidence. For the reasons set forth above in section II(B)(1)(a)(ii), the court concludes that Castro would not have prevailed on his Fourth Amendment claim. Therefore, this part of defendant Castro's motion is also **denied.**

d. Failure to move for severance

Defendant Castro next claims that his counsel was ineffective because he did not file a motion for severance. Defendant Castro asserts that severance was necessary if he was to be able to effectively employ his blame-shifting defense. A motion for severance under Federal Rule of Criminal Procedure 14 rests in the sound discretion of the trial court.[4]

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[4]At the time of defendant Castro's trial, Federal Rule of Criminal Procedure 14 provided as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

(continued...)

United States v. Ortiz, 315 F.3d 873, 897 (8th Cir. 2002), *cert. denied*, 538 U.S. 1042 (2003);*United States v. Davis*, 103 F.3d 660, 667 (8th Cir. 1996); *United States v. Koskela*, 86 F.3d 122, 125 (8th Cir. 1996); *United States v. Jackson*, 64 F.3d 1213, 1217 (8th Cir. 1995), *cert. denied,* 116 S. Ct. 966 (1996); *United States v. Fregoso*, 60 F.3d 1314, 1328 (8th Cir. 1995); *United States v. Patterson*, 20 F.3d 801, 805 (8th Cir. 1994); *United States v. Searing*, 984 F.2d 960, 965 (8th Cir. 1993); *United States v. Wint*, 974 F.2d 961, 966 (8th Cir. 1992), *cert. denied*, 506 U.S. 1062 (1993); *United States v. Jones*, 880 F.2d 55, 61 (8th Cir. 1989); *United States v. Garcia*, 785 F.2d 214, 219 (8th Cir.), *cert. denied sub nom. Barker v. United States*, 475 U.S. 1143 (1986); *United States v. Love*, 692 F.2d 1147, 1152 (8th Cir. 1980); *United States v. Brown*, 605 F.2d 389, 393 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); *United States v. Runge*, 593 F.2d 66, 73 (8th Cir.), *cert. denied*, 444 U.S. 859 (1979); *United States v. Jackson*, 549 F.2d 517, 523 (8th Cir.), *cert. denied*, 430 U.S. 985 (1977); *accord United States v. Balter*, 91 F.3d 427, 433 (3d Cir. 1996); *United States v. Mason*, 9 F.3d 155, 158 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1331 (1994); *United States v. LaSanta*, 978 F.2d 1300, 1308 (2d Cir. 1992); *United States v. Sabatino*, 943 F.2d 94, 96 (1st Cir. 1991); *United States v. Caliendo*, 910 F.2d 429, 437 (7th Cir. 1990); *United States v. Turoff*, 853 F.2d 1037, 1042 (2d Cir.

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[4](...continued)

> In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

FED. R. CRIM. P. 14. In 2002, Rule 14 was amended "as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." FED. R. CRIM. P. 14 advisory committee's note. These changes were "intended to be stylistic only." *Id.*

1988); *United States v. Van Cauwenberghe*, 827 F.2d 424, 431 (9th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988); *United States v. Rucker*, 586 F.2d 899, 902 (2d Cir. 1978). Judicial economy favors the joint trial of defendants where the charged offenses are based on the same evidence and result from the same or similar acts. *See Zafiro v. United States*, 506 U.S. 534, 537 (1993); *United States v.Francis*, 367 F.3d 805, 830 (8th Cir. 2004); *United States v. Frazier*, 280 F.3d 835, 844 (8th Cir. 2002); *United States v. Doyle*, 60 F.3d 396 (8th Cir. 1995); *United States v. McGuire*, 45 F.3d 1177, 1187 (8th Cir. 1995); *United States v. Mendoza*, 876 F.2d 639, 643 (8th Cir. 1989); *United States v. Voss*, 787 F.2d 393, 401 (8th Cir.), *cert. denied*, 479 U.S. 888 (1986); *United States v. Dennis*, 625 F.2d 782, 801 (8th Cir. 1980); *United States v. Polizzi*, 801 F.2d 1543, 1553 (9th Cir. 1986); *United States v. Peters*, 791 F.2d 1270, 1301 (7th Cir.), *cert. denied sub nom. Odoner v. United States*, 479 U.S. 847 (1986). "Joint trials 'play a vital role in the criminal justice system.' They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" *Zafiro*, 506 U.S. at 537 (quoting *Richardson v. Marsh*, 481 U.S. 200, 209 (1987)); *see McGuire*, 45 F.3d at 1187.

In order to merit a severance, the movant must establish that "real prejudice" will result from a joint trial. *United States v. Williams*, 923 F.2d 76, 78 (8th Cir.), *cert. denied*, 502 U.S. 841 (1991); *Jones*, 880 F.2d at 61; *see United States v. Kime*, 99 F.3d 870, 880 (8th Cir. 1996), *cert. denied*, 519 U.S. 1141 (1997); *United States v. Darden*, 70 F.3d 1507, 1527 (8th Cir. 1995), *cert. denied,* 116 S. Ct. 1449 (1996); *United States v. Penson*, 62 F.3d 242, 244 (8th Cir. 1995); *United States v. Marin-Cifuentes*, 866 F.2d 988, 994 (8th Cir. 1989); *see also United States v. Willis*, 940 F.2d 1136, 1139 (8th Cir. 1991); *United States v. McConnell*, 903 F.2d 566, 571 (8th Cir. 1990), *cert. denied sub nom. Bryne v. United States*, 498 U.S. 1106 (1991); *United States v. Cadwell*, 864 F.2d 71, 73 (8th Cir. 1988); *United States v. Adkins*, 842 F.2d 210, 212 (8th Cir. 1988);

Garcia, 785 F.2d at 220; *United States v. Lee*, 743 F.2d 1240, 1248 (8th Cir. 1984); *United States v. Miller*, 725 F.2d 462, 467 (8th Cir. 1984). A defendant's burden in making this showing has been characterized as heavy. *United States v. Basile*, 109 F.3d 1304, 1310 (8th Cir.), *cert. denied*, 522 U.S. 873 (1997); *United States v. Warfield*, 97 F.3d 1014, 1019 (8th Cir. 1996); *Marin-Cifuentes*, 866 F.2d at 979; *United States v. Long*, 857 F.2d 436, 443 (8th Cir. 1988); *United States v. Robinson*, 774 F.2d 261, 266 (8th Cir. 1985).

Severance is not warranted merely because the movant did not personally participate in every act constituting the charged offense, *United States v. Lynch*, 800 F.2d 765, 767 (8th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987), or because the movant stands a better chance of acquittal at a separate trial. *Kime*, 99 F.3d at 880; *United States v. Anthony*, 565 F.2d 533, 538 (8th Cir. 1977), *cert. denied*, 434 U.S. 1079 (1978). A defendant is not entitled to severance merely because the evidence against a co-defendant may be more weighty or damaging than the evidence against him or her. *See United States v. Mathison*, 157 F.3d 541, 545 (8th Cir. 1998), *cert. denied*, 525 U.S. 1165 (1999); *Doyle*, 60 F.3d 396; *McGuire*, 45 F.3d at 1187; *United States v. Garrett*, 961 F.2d 743, 746 (8th Cir. 1992); *United States v. Pecina*, 956 F.2d 186 (8th Cir. 1992); *United States v. Pou*, 953 F.2d 363, 368-69 (8th Cir. 1992); *Love*, 692 F.2d at 1152; *United States v. Williams*, 604 F.2d 1102, 1119 (8th Cir. 1979); *United States v. Knife*, 592 F.2d 472, 480 (8th Cir. 1979); *United States v. Fuel*, 583 F.2d 978, 987 (8th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979).

Clear prejudice does not merely mean that a defendant's chances for acquittal may be better with a separate trial. *Doyle*, 60 F.3d 396; *United States v. Adkins*, 842 F.2d 210, 211-12 (8th Cir. 1988); *United States v. Lee*, 743 F.2d 1240, 1248 (8th Cir. 1984); *Jackson*, 549 F.2d at 524; *see Peters*, 791 F.2d at 1301. "Prejudice sufficient to require

severance occurs 'when the defendant is deprived of an appreciable chance that he would not have been convicted in a separate trial, and not merely when he would have had a better chance for acquittal in a separate trial.'" *United States v. Vue*, 13 F.3d 1206, 1210 (8th Cir. 1994) (quoting *United States v. O'Meara*, 895 F.2d 1216, 1219 (8th Cir.), *cert. denied*, 498 U.S. 943 (1990)); *accord United States v. Beasley*, 102 F.3d 1440, 1448 (8th Cir. 1996); *Kime*, 99 F.3d at 880; *United States v. Horne*, 4 F.3d 579, 590 (8th Cir. 1993), *cert. denied*, 510 U.S. 1138 (1994).

Here, Castro asserts that his counsel was ineffective in failing to request a severance because severance was necessary in order to employ the antagonistic blame-shifting defense. "Mutually antagonistic defenses are not prejudicial per se." *Zafiro v. United States*, 506 U.S. 534, 539 (1993) (declining to adopt a bright-line rule mandating severance whenever co-defendants have conflicting defenses); *United States v. Voigt*, 89 F.3d 1050, 1094 (3d Cir. 1996); *United States v. Pettigrew*, 77 F.3d 1500, 1517 (5th Cir. 1996); *United States v. Ghazeleh*, 58 F.3d 240, 244 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 716 (1996); *United States v. Mohammad*, 53 F.3d 1426, 1431 (7th Cir. 1995); *United States v. Williams*, 45 F.3d 1481, 1484 (10th Cir. 1995). Hostility or finger pointing among defendants is insufficient to require separate trials. *United States v. Delpit*, 94 F.3d 1134, 1143 (8th Cir. 1996); *Jenner v. Class*, 79 F.3d 736, 742 (8th Cir.), *cert. denied*, 117 S. Ct. 194 (1996). Instead, where a defendant asserts that his defense would conflict with a co-defendant's defense, that defendant must show more than that his or her anticipated defense strategy is generally antagonistic to that of the other co-defendants. *See Jones*, 880 F.2d at 63. The mere fact that some degree of hostility exists among the defendants is insufficient to require severance. *See United States v. Shivers*, 66 F.3d 938, 940 (8th Cir.) (Holding that "mere hostility between defendants or one defendant's attempt 'to save himself at the expense of another' codefendant is not a sufficient ground to require

severance."), *cert. denied*, 116 S. Ct. 581 (1995); *United States v. Morris*, 18 F.3d 562, 566 (8th Cir. 1994) ("one defendant's efforts to exonerate himself at the expense of another is not sufficient to require separate trials."); *Searing*, 984 F.2d at 965 ("The mere fact that defendants are apparently hostile to one another is not grounds for severance."); *United States v. Johnson*, 944 F.2d 396, 403 (8th Cir.) ("The mere fact that one defendant tries to shift the blame to another defendant does not mandate separate trials."), *cert. denied*, 502 U.S. 1008 (1991); *United States v. Davis*, 747 F.2d 440, 443 (8th Cir. 1984) (holding that "the fact that there is hostility among the defendants is not a sufficient ground to require separate trials.").

Nor is severance mandated because the joinder will make a defense more problematic. *See McGuire*, 45 F.3d at 1187. Defendants are required to show that the conflict between the defense is so prejudicial that the differences are "actually irreconcilable." *United States v. Oakie*, 12 F.3d 1436, 1441 (8th Cir. 1993); *United States v. Bordeaux*, 84 F.2d 1544, 1547 (8th Cir. 1996); *United States v. Mason*, 982 F.2d 325, 328 (8th Cir. 1993); *see Robinson*, 774 F.2d at 267. The test for determining whether defenses are irreconcilable is "whether the defenses so conflict that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." *United States v. Gutberlet*, 939 F.2d 643 (8th Cir. 1991) (quoting *United States v. Jones*, 880 F.2d 55, 63 (8th Cir. 1989); *accord United States v. Koon*, 34 F.3d 1416, 1436 (9th Cir. 1994) (holding that severance based on antagonistic defenses appropriate only when "'[T]he essence or core of the defenses must be in conflict such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other.'"), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996); *United States v. Linn*, 31 F.3d 987, 992 (10th Cir. 1994) (holding that "the conflict between codefendants' defenses must be such that 'the jury, in order to believe the core of one defense, must necessarily disbelieve the

core of the other.'") (quoting *United States v. Swingler*, 758 F.2d 477, 495 (10th Cir. 1985)); *United States v. Farrell*, 877 F.2d 870, 876 (11th Cir.) ("The essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other.") *cert. denied*, 493 U.S. 922 (1989); *United States v. Rea*, 958 F.2d 1206, 1224 (2d Cir. 1992) ("Severance on the ground of inconsistent defenses is required only when the jury, in order to believe the core testimony offered on behalf of one defendant, must necessarily disbelieve the testimony offered on behalf of his codefendant . . . "); *United States v. Long*, 894 F.2d 101, 106 (5th Cir. 1990) ("'The essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other.'") (quoting *United States v. Romanello*, 726 F.2d 173, 177 (5th Cir. 1984)).

Here, defendant Castro has not demonstrated that his blame-shifting defense was irreconcilable with the other defendants' defenses. Rather, the jury would have been free to believe or disbelieve both defenses. As the Eighth Circuit has pointed out repeatedly, "'the mere fact that one defendant tries to shift the blame to another does not mandate separate trials.'" *Shivers*, 66 F.3d at 940 (quoting *Johnson*, 944 F.2d at 403). Therefore, given the unlikelihood of success of a motion to sever, Castro cannot establish that, but for his attorneys' failure to file a motion to sever, the outcome of the proceedings would have been different. *See Strickland*, 466 U.S. at 694. Thus, Castro's claim fails the prejudice prong of the *Strickland* test. Therefore, this part of defendant Castro's motion is also **denied.**

e. Failure to appeal magistrate judge's order

Defendant Castro also raises as an independent ground that his counsel was ineffective for not appealing the order of Judge Zoss denying his motion to continue trial and for an extension of time to file a motion to suppress evidence. For the reasons set

forth above in section II(B)(1)(a)(ii), the court concludes that Castro would not have prevailed on his Fourth Amendment claim if he had appealed Judge Zoss's order and subsequently filed a timely motion to suppress evidence. Therefore, this part of defendant Castro's motion is also **denied.**

f. Failure to withdraw

Defendant Castro next contends that his counsel was ineffective for not withdrawing from the case when the motion to continue trial and motion for an extension of time to file a motion to suppress evidence were denied. Castro asserts that by remaining in the case, his counsel was unable to raise the blame-shifting defense and seek suppression of the evidence. For the reasons set forth above in sections II(B)(1)(a)(i) and II(B)(1)(a)(ii), the court concludes that Castro has failed to show he was prejudiced by his counsel's actions and therefore cannot demonstrate ineffective assistance of counsel. Therefore, this part of defendant Castro's motion is also **denied.**

g. Failure to renew motions

Defendant Castro also contends that his counsel was ineffective for not renewing his motion to continue the trial and motion for extension of time to file a motion to suppress evidence following the filing of the Superseding indictment in this case. Castro again asserts that as a result of his counsel's error he was unable to raise his blame-shifting defense and to seek suppression of the evidence. For the reasons set forth above in sections II(B)(1)(a)(i) and II(B)(1)(a)(ii), the court finds that even if the court assumes that Castro's counsel's performance was deficient in not renewing defense motions to continue the trial and for extension of time to file a motion to suppress evidence following the filing of the Superseding indictment, Castro has failed to show he was prejudiced by his counsel's actions and therefore cannot demonstrate ineffective assistance of counsel. Therefore, this part of defendant Castro's motion is also **denied.**

h. Failure to file motion to dismiss

Defendant Castro next asserts that his counsel was ineffective for not filing a motion to dismiss the Superseding indictment based on a violation of the Speedy Trial Act's 30 days after arrest filing deadline. A "superseding indictment" means a second indictment issued in the absence of a dismissal of a prior indictment. *United States v. Rojas-Contreras*, 474 U.S. 231, 237 (1985) (Blackman, J., concurring). The Speedy Trial Act states that, inter alia, "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b). Any indictment violating this provision offends the Sixth Amendment right to a speedy trial on which the Speedy Trial Act is based, and must be dismissed. *United States v. Rivera Const. Co.*, 863 F.2d 293, 295 (3d Cir. 1988). In this case, the original Indictment was filed well within thirty days of defendant Castro's arrest. However, the Superseding Indictment was issued almost four months after defendant Castro's arrest. The question then becomes whether the Superseding Indictment violated the Speedy Trial Act's thirty-day rule. The flaw in defendant Castro's claim is that courts have uniformly held that a superseding indictment issued more than thirty days after a defendant's arrest which adds entirely new charges to those contained in the original indictment does not violate the Speedy trial Act. *United States v. Hemmings*, 258 F.3d 587, 592 (7th Cir. 2001) (holding that superseding indictments containing additional charges which were filed more than 30 days after defendant's arrest, did not violate provision of Speedy Trial Act requiring indictment to be filed within 30 days of defendant's arrest); *United States v. Mosquera*, 95 F.3d 1012, 1013 (11th Cir. 1996) (stating that "[t]he Speedy Trial Act does not guarantee that an arrested individual indicted within thirty days of his arrest must, in that thirty day period, be indicted for every crime

known to the government failing which he may never be charged"); *United States v. Orbino*, 981 F.2d 1035, 1037 (9th Cir. 1992) (holding that not all charges against a defendant must be issued within thirty days after arrest); *United States v. Castellano*, 848 F.2d 63, 65 (5th Cir.1988) (rejecting the argument that the superseding indictment, alleging different charges from the original indictment but brought more than thirty days after arrest, was untimely). Thus, Castro's counsel would not have been successful if he had filed a motion to dismiss the Superseding indictment on the ground that there had been a violation of the Speedy Trial Act's 30 days after arrest filing deadline. Given the unlikelihood of success of a motion to dismiss raising that ground, Castro cannot establish that, but for his attorneys' failure to file a motion to dismiss the Superseding indictment, the outcome of the proceedings would have been different, and therefore cannot demonstrate ineffective assistance of counsel.[5] Therefore, this part of defendant Castro's motion is also **denied.**

i. Failure to withdraw after trial

Defendant Castro also contends that his counsel was ineffective for not withdrawing from the case after trial was concluded. Castro asserts that by his counsel remaining in the case, he was unable to raise his ineffective assistance of counsel claims on direct appeal. The Eighth Circuit Court of Appeals has indicated on a number of occasions that ineffective assistance of counsel claims should generally be raised in collateral post-conviction proceedings where the record can be developed to examine counsel's performance, *see United States v. Whitefeather*, 275 F.3d 741, 743 (8th Cir. 2002);

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[5]The court further notes that since defendant Castro was acquitted of only the new charge contained in the Superseding indictment and convicted of the offense of possessing methamphetamine with intent to distribute, a charge which was contained in the original indictment, the failure of his counsel to seek dismissal of the Superseding indictment was, in any event, harmless.

United States v. Campa-Fabela, 210 F.3d 837, 840 (8th Cir. 2000), *cert. denied*, 532 U.S. 1010 (2001); *United States v. Stevens*, 149 F.3d 747, 748 (8th Cir.), *cert. denied*, 525 U.S. 1009 (1998); *United States v. Bowers*, 21 F.3d 843, 844 (8th Cir. 1994); *United States v. Sanchez*, 927 F.2d 376, 378 (8th Cir. 1991). Further, such claims are not procedurally defaulted if not first brought on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 508 (2003). Thus, because defendant Castro has an opportunity to raise his ineffective assistance of counsel claims in collateral post-conviction proceedings, the court concludes that defendant Castro has not demonstrated that he was prejudiced by his counsel's failure to withdraw from the case following trial. Therefore, this part of defendant Castro's motion is also **denied.**

j. Ineffectiveness on appeal

Similarly, defendant Castro next asserts that his counsel was ineffective on direct appeal because he was unable to raise his ineffective assistance of counsel claims. For the reasons set forth above in section II(B)(1)(i), the court concludes that Castro has not demonstrated that he was prejudiced by his counsel's inability to raise claims of ineffective assistance of counsel on direct appeal. Therefore, this part of defendant Castro's motion is also **denied.**

k. Ineffectiveness at sentencing

Defendant Castro also contends that his counsel was ineffective at the time of sentencing in the following respects: for failing to seek a lower sentence for non-injectable methamphetamine, and for failing to request a minimal or minor role adjustment. The court will consider each of these issues in turn.

i. Methamphetamine as schedule III drug

Defendant Castro asserts that his counsel was ineffective for failing to seek a maximum sentence of five years for methamphetamine as a schedule III drug rather than

a schedule II drug. On July 7, 1971, the Director of the Bureau of Narcotics and Dangerous Drugs, on behalf of the Attorney General, reclassified methamphetamine from a schedule III drug to a schedule II drug based on its high potential for abuse relative to other substances. *See* 36 F.R. 12734, 12735 (July 7, 1971); 21 C.F.R. § 1308.12(d). Although 21 U.S.C. § 812(c), which lists the drug classification schedule, classifies methamphetamine as a schedule II drug when it is contained in "any injectable liquid," but classifies methamphetamine as a schedule III drug when it is in any other form. Federal courts of appeals have uniformly held that "the reclassification of methamphetamine as a schedule II substance applies to all forms of methamphetamine in accordance with 21 C.F.R. § 1308.12(d) despite the statute's distinction." *United States v. Macedo*, 371 F.3d 957, 981 (7th Cir. 2004); *accord United States v. Roark*, 924 F.2d 1426, (8th Cir. 1991) (holding that methamphetamine was properly classified as schedule II controlled substance and that transfer of methamphetamine from schedule III to schedule II controlled substance was accomplished through correct procedures and supported by necessary findings); *see also United States v. Gori*, 324 F.3d 234, 240 (3d Cir. 2003) (reasoning that 21 C.F.R. § 1308.12(d) must supercede 21 U.S.C. § 812(c)'s schedule classification as the Attorney General acted pursuant to express authorization and the regulation was properly promulgated); *United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994) (holding that transfer of methamphetamine from Schedule III to Schedule II satisfied requirements of statute permitting Attorney General to transfer drugs between schedules); *United States v. Greenwood*, 974 F.2d 1449, 1472 (5th Cir. 1992) ("Since the early 1970s, as a matter of law, methamphetamine has been classified as a schedule II controlled substance."); *United States v. Allison*, 953 F.2d 870 (5th Cir.) (holding rescheduling of methamphetamine from Schedule III to Schedule II had been properly accomplished), *cert. denied*, 504 U.S. 962 1992); *United States v. Kendall*, 887 F.2d 240, 241 (9th Cir. 1989) (holding that Director

of the Bureau of Narcotics and Dangerous Drugs had authority to reschedule all forms of methamphetamine to Schedule II in 1971). Thus, Castro cannot establish that he was prejudiced by his attorney's failure to seek to have him sentenced to a maximum sentence of five years for methamphetamine as a schedule III drug rather than a schedule II drug. Therefore, this part of defendant Castro's motion is also **denied.**

ii. Role reduction

Defendant Castro asserts that his counsel was ineffective for failing to request a minimal or minor role adjustment at his sentencing. Castro argues that given the scant evidence of his involvement, he was entitled to such a reduction. Under section 3B1.2 of the Sentencing Guidelines, the court may decrease the defendant's offense level as follows:

> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
> (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
> In cases falling between (a) and (b), decrease by 3 levels.

U.S.S.G. § 3B1.2. The "minimal participant" provision of subsection (a) covers "defendants who are plainly among the least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2 n.1. "[T]he defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others" may indicate that he was a minimal participant. *Id*. By contrast, the "minor participant" provision of subsection (b) covers "any participant who is less culpable than most other participants, but whose role could not be described as minimal [under subsection (a)]." *Id*. n.3. The Background Notes to the Sentencing Guidelines explain that section 3B1.2 "provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a

determination that is heavily dependent upon the facts of the particular case." U.S.S.G. § 3B1.2, Background.

To prevail on an ineffective assistance of counsel claim for a mitigating role adjustment, courts have held "'whether the defendant was prejudiced by counsel's failure to request a § 3B1.2 adjustment depends on whether the district court would have granted the request, a matter only the district court can decide.'" *United States v. Montoan-Herrera*, 351 F.3d 462, 464 (10th Cir. 2003) (quoting *United States v. Harfst*, 168 F.3d 398, 404 (10th Cir. 1999)). Whether Castro's role was minimal or minor, as well as whether he would receive a two, three, or four-point reduction, depended on the particular facts of the case. Here, the record does not support any finding that Castro's role was less significant than that of his co-defendants. Nor has Castro asserted the existence of any facts which would have supported a role reduction at the time of his sentencing. Therefore, the court concludes that Castro has not demonstrated that he was prejudiced by his counsel's failure to seek a role adjustment. Therefore, this part of defendant Castro's motion is also **denied.**

2. Incorrect criminal history category

Defendant Castro also claims that his sentence was incorrect because his criminal history category was in part based on a conviction that was subsequently vacated. In his motion, defendant Castro asserts that he was assessed two criminal history points for his conviction in Los Angeles County Superior Case No. SAO28686 but that the conviction had been vacated. He also asserts in his § 2255 motion that he would submit to this court a copy of the order vacating that conviction as soon as he received it. To date, defendant Castro has not supplied the court with any record indicating that his conviction in Los Angeles County Superior Case No. SAO28686 has been vacated. Moreover, the court notes that defendant Castro did not address this allegation in his moving papers.

Therefore, the court concludes that defendant Castro has failed to prove that his criminal history category assessment was incorrect and this part of defendant Castro's motion is also **denied.**

C. Certificate Of Appealability

Defendant Castro must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability in this case. *See Miller-El v. Cockrell*, 123 S. Ct. 1029, 1039 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 882 n.1 (8th Cir. 1999); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Ramsey v. Bowersox*, 149 F.3d 749 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied*, 525 U .S. 834 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Cox*, 133 F.3d at 569. Moreover, the United States Supreme Court reiterated in *Miller-El* that "'[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 123 S. Ct. at 1040 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The court determines that Castro's petition does not present questions of substance for appellate review, and therefore, does not make the requisite showing to satisfy § 2253(c). *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). With respect to Castro's claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

III. CONCLUSION

Defendant Castro's § 2255 motion is **denied**, and this matter is **dismissed in its entirety**. Moreover, the court determines that the petition does not present questions of substance for appellate review. *See* 28 U.S.C. § 2253(c)(2); FED. R. APP. P. 22(b). Accordingly, a certificate of appealability will not issue.

IT IS SO ORDERED.

DATED this 4th day of August, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA